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No. 06-1099

In The
Supreme Court of the United States

Stephen E. Jones and Doyle Clark,
Petitioners,

v.

United Parcel Service, Inc. and
International Brotherhood of Teamsters, Local 41,
Respondents.

On Petition For Writ of Certiorari
To The United States Court of Appeals
For The Eighth Circuit

BRIEF OF TEAMSTERS LOCAL 41 IN OPPOSITION

G. Gordon Atcheson
Counsel of Record
The Atcheson Law Office
4800 Rainbow Blvd.
Suite 6
Westwood, Kansas 66205
(913) 362-8650

Question Presented

In their questions presented, Petitioners Stephen E. Jones and Doyle Clark misstate the course of the proceedings below and the actions of the trial judge. In turn, their questions incorrectly characterize the record. The trial judge declined to consider Petitioners' factual recitations made in opposition to summary judgment because they failed to conform to the governing rules. The trial judge then reviewed the record properly before him and decided the motions on the merits, entering judgment for Defendants United Parcel Service and International Brotherhood of Teamsters, Local 41. The question is appropriately stated as:

Whether the trial judge acted in his sound discretion in declining to consider factual assertions that failed to conform to the rules governing summary judgment practice and then properly entered judgment on the record properly before him.

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Statement of the Case

1. **The Facts.** From the perspective of Respondent International Brotherhood of Teamsters, Local 41, this is a fairly routine duty of fair representation case in which both the trial judge and the U.S. Court of Appeals for the Eighth Circuit found that the Local satisfied the legal duty it owed Petitioners Stephen E. Jones and Doyle Clark as members of the union after United Parcel Service terminated their employment. Neither the claim itself nor the proceedings below reflect extraordinary circumstances or issues justifying review before this Court.

A union must endeavor to represent its members in a way that is not arbitrary, discriminatory, or undertaken in bad faith. *Vaca v. Sipes*, 386 U.S. 171, 190 (1967). A union member who believes the organization has violated that duty may bring what is commonly called a hybrid § 301/DFR claim. To prove the claim, a union member must establish both a breach of a collective bargaining agreement on the part of her employer and a failure of the union to represent her in redressing that breach. *Hines v. Anchor Motor Freight, Inc.*, 424 U.S. 554, 570-71(1976).[1]

Petitioners Jones and Clark belonged to Local 41 and worked out of a UPS facility in Lenexa, Kansas. Jones drove a truck from Lenexa to Wichita and back. Clark worked in the facility sorting packages and as a hazardous materials responder. Pet. App. 2. In 2002, Jones and Clark actively participated in the Local union elections – Clark as a candidate and Jones as an organizer – in support of a slate

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1/ Breach of a labor contract gives rise to a violation of § 301 of the Labor Management Relations Act, 29 U.S.C. § 185. And a union's legally inadequate handling of a member's grievance violates the judicially imposed "duty of fair representation." Hence, a union member's cause of action requiring proof of both has become known as a § 301/DFR claim.

opposing the incumbent officers. Clark won a seat on the union executive board, as did Harold McLaughlin, a UPS truck driver who also ran on the opposition slate.

The day following the union election, UPS manager Jeff Johnson fired Clark for insubordination. Pet. App. 3. Clark had been terminated a month earlier for leaving the facility without permission for several hours during his shift, but was reinstated when Local 41 representatives negotiated a two-day suspension in place of the dismissal. Pet. App. 2. Almost a month after the election, UPS manager Lavell White terminated Jones because he walked off the job the evening before rather than drive an alternate run to St. Louis as directed by the dispatcher.[2] Pet. App. 3-4.

Local 41 filed grievances protesting the terminations of Jones and Clark. After unproductive efforts to resolve the grievances with management personnel at UPS's Lenexa facility, Local 41 sought review before what is known as the

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2/ Jones had a peculiar argument that the reassignment during his normal work hours violated the collective bargaining agreement. He should have filed a grievance to test his theory. Jones, however, ignored a basic tenet of labor-management relations – obey now; grieve later – when he simply refused to work. *Crider v. Spectrulite Constortium, Inc.*, 130 F.3d 1238, 1242 (7th Cir. 1997) (A unionized worker was properly terminated for cause when he refused to comply with a reasonable instruction of his employer and, thus, ignored "the time-honored principle of industrial relations that – with few exceptions – an employee must 'obey now and grieve later[.]'"); *Johns-Manville Corp.*, 115 LA 705, 706 (Baroni 2001) ("It is a well-established principle that employees must obey a lawful order, even if it is believed to be incorrect or in violation of the Agreement, and then resort to the grievance procedure for relief. This is known as the 'obey now-grieve later' doctrine.") *Cf. Boys Markets v. Retail Clerks Union*, 398 U.S. 235, 249 (1970) ("Indeed, the very purpose of arbitration procedures [in a collective bargaining agreement] is to provide a mechanism for the expeditious settlement of industrial disputes without resort to strikes, lockouts, or other self-help measures.").

Mo-Kan panel. As the name suggests, the panel hears grievances arising out of contract disputes between UPS and Teamster Locals in Kansas and Missouri. A given panel consists of an equal number of UPS and union representatives, typically three each, with the proviso that the management members be from facilities other than the one out of which the grievance arose and the union members be from different Locals.[3] The Mo-Kan panel receives evidence, hears argument, and, after deliberating in closed session, announces its decision on the grievance. Pet. App. 4-5.

Local 41 Business Agent John Thompson presented Clark's grievance to the Mo-Kan panel and argued for reinstatement. Union steward John Toplikar also spoke to the panel on behalf of Clark. And Clark addressed the panel at length in his own defense. At the conclusion of the hearing, Clark acknowledged to the panel that he had been adequately represented. The panel denied the grievance and upheld the termination. Pet. App. 19-20.

Local 41 Business Agent Clint Long presented Jones's grievance to the Mo-Kan panel and likewise argued for reinstatement. Among other evidence, Long called three witnesses Jones had specifically requested. And Jones offered lengthy comment to the Mo-Kan panel on his discharge. He, too, agreed that he had been adequately represented. The panel denied the grievance and upheld the

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3/ The courts have consistently treated the use of labor-management panels to hear and resolve workplace grievances as the equivalent of arbitration. *Tongay v. Kroger Co.*, 860 F.2d 298, 300 (8th Cir. 1988) ("Members of these committees essentially function as arbitrators on an adjudicatory body[.]"); *Early v. Eastern Transfer*, 699 F.2d 522, 559-60 (1st Cir. 1983), *cert. denied*, 464 U.S. 824 (cases cited therein). *Cf. Hines*, 424 U.S. at 562-63 (treating such panel as equivalent of arbitration in DFR action). The panel members are to exercise independent judgment in the manner of arbitrators rather than functioning as partisans in deciding the grievances. *Tongay*, 860 F.2d at 300.

termination. Id.

Mo-Kan hearings are recorded and, if requested, later transcribed. The transcripts of the hearings for Jones and Clark were authenticated by the business agents and made part of the record on summary judgment and appeal. Thus, the lower courts had detailed, contemporaneous evidence of how Local 41 represented the two. See Pet. App. 47-50, 93-96, 103 (district court specifically cites hearing transcripts).

In short, the Local 41 business agents handling the grievances met with Jones and Clark to discuss information and arguments to be presented in the hearings, articulated positions favorable to them during the hearings, and allowed them to speak at the hearings. Those efforts are the hallmark of appropriate union representation. *See, e.g., Taylor v. Belger Cartage Service, Inc.*, 762 F.2d 665, 668 (8th Cir. 1985) (no actionable DFR claim when union pursued grievance through every step of the process and grievant had an opportunity to speak his piece at the grievance hearings). It is well-settled that union representatives, as laypersons, are not held to the standards of lawyers. *Buford v. Runyon*, 160 F.3d 1199, 1203 (8th Cir. 1998); *Curtis v. United Transp. Union*, 700 F.2d 457, 458 (8th Cir. 1983); *Freeman v. O'Neal Steel, Inc.*, 609 F.2d 1123, 1127 (5th Cir. 1980), *cert. denied*, 499 U.S. 833 (1980) ("The union representative is not a lawyer and cannot be expected to function as one [in processing grievances]."). Moreover, mere negligence or poor judgment (honestly exercised) does not violate the representational duty. *United Steelworkers of America, AFL-CIO v. Rawson*, 495 U.S. 362, 372-73 (1990); *Buford*, 160 F.3d at 1202 ("Mere negligence, poor judgment, or ineptitude by a union is insufficient to establish a breach of the duty of fair representation."); *Walk v. P*I*E* Nationwide, Inc.*, 958 F.2d 1323, 1326 (6th Cir. 1992) ("[A]n unwise or even an unconsidered decision by the union is not necessarily an irrational decision.").

In this case, the record establishes that Local 41 more than adequately represented Jones and Clark. The Eighth Circuit so held: "We have no difficulty concluding that Local 41's representation was not in breach of its duties." Pet. App. 20. Jones and Clark, however, tried to craft a conspiracy theory under which Local 41 and the company joined forces to be rid of them because of their role in the union elections. But they never explained just why UPS should care much about the union's election or why McLaughlin, who was also elected to the union's executive board from the opposition slate, avoided the same fate. Indeed, he was never disciplined at all. See generally Pet. App. 7 n.2; Pet. App. 20 (discounting conspiracy as without evidentiary support). Local 41 fought for Jones and Clark in the way a union should for its members. There is nothing remarkable – or legally improper – about that aspect of the case.[4]

2. **Procedural History.** Jones and Clark, on the one hand, and UPS, on the other, generated the bulk of the voluminous record in this case sparring over various discrimination claims directed at the company alone. Pet. App. 7. In their petition, Jones and Clark nonetheless treat UPS and Local 41 as if they were conjoined twins. But that is hardly a correct portrait of the litigation, as the lower court decisions reflect.

The procedural history of the case is undoubtedly more unusual than the substance of the claims against Local 41. But that history no more warrants review here. The issues raised here focus on the summary judgment proceedings

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4/ Jones and Clark also asserted claims against Local 41 under the Labor Management Reporting and Disclosure Act, 29 U.S.C. § 411, alleging the union inadequately represented them in retaliation for their political activity. Everyone has agreed that if the union satisfied its duty of fair representation both the § 301/DFR claim and the LMRDA claim necessarily would fail. Pet. App. 22-23.

and, in particular, the response of Jones and Clark to the motions Local 41 and UPS filed. Local 41 filed a single summary judgment motion and supporting memorandum directed at all of the claims against it. UPS filed separate motions and memorandums against Jones and Clark. Jones and Clark responded to all three motions in a consolidated opposition – a novel-length document filling 480 pages. Pet. App. 31-32. They have not, however, placed their epic in the appendix to this Court even though it is the centerpiece of the dispute upon which they seek review. The opposition memorandum is, in some respects, difficult to adequately characterize in the abstract. It is extremely long, though length is not its true vice.[5]

As both the district judge and the court of appeals held, the opposition memorandum was filled with statements of purported fact that had no support in the record or that misstated the evidence. In addition, the responses to movants' facts often consisted simply of paragraph after paragraph of argument without any anchor to the record. Pet. App. 10-13 (court of appeals); Pet. App. 32-37 (district court). Both courts readily (and understandably) found the opposition to be in violation of Rule 56.1 of the Local Rules for the U.S. District Court for the Western District of Missouri. Pet. App. 12, 37. The local rule, Pet. App. 139-40, requires facts presented on summary judgment to set forth concisely with specific references to the supporting evidentiary record. And any opposition to the facts must likewise be succinctly stated and referenced in the evidence.

5/The opposition memorandum begins with 168 pages of additional "facts" to be considered on summary judgment presented in 948 paragraphs. The memorandum then takes 179 pages to respond to the fact statements in the moving papers. And the document concludes with 132 pages of argument in opposition to summary judgment. Pet. App. 32-33.

The examples the lower courts cited amply demonstrate the noncompliant character of the opposition memorandum. Pet. App. 10-11, 33-34. The deficiencies are, in many respects, typified in the response to Local 41's factual assertion that when Clark was terminated for walking off the job on September 18, a first-step hearing was immediately convened because union Business Agent Thompson was already at the UPS facility. As the district court explained, the response consisted of a half-page, single-spaced narrative advocating Jones and Clark's conspiracy theory without so much as a specific citation to the record. Instead, the Petitioners referred generally to their entire 948-paragraph statement of additional facts. Pet. App. 36.

Both courts clearly explained that the deficiencies they cited were *illustrative* of a systemic failing in the factual representations of the opposition memorandum and not meant as an exhaustive listing of the problems. Pet. App. 10-11 (court of appeals); Pet. App. 34 ("[T]he Plainitiffs' 948 paragraph Fact Statement contains numerous and egregious misrepresentations and misstatements. In an effort to illustrate the appalling nature of these representations, the Court offers some examples."), id. 35 ("[T]he occurrences are far too numerous to list here[,] and, therefore, the Court will be forced to offer examples to demonstrate these violations.") (district court). While the opposition memorandum failed to comply with the letter of Local Rule 56.1, it also ignored the spirit, if not the letter, of Fed.R.Civ.P. 56, which requires the evidence offered be of the type that would be admissible at trial. Thus, statements without foundation in the record cannot establish a basis for granting or denying summary judgment.

The trial judge struck the factual statements from the opposition memorandum and proceeded to decided the motions for summary judgment based on the materials properly submitted in compliance with the rules. The court

granted summary judgment to both Local 41 and UPS. Contrary to the implication Jones and Clark cast in their petition, the trial judge *did not* enter judgment against them as sanction for their deficient briefing. Rather, he simply applied Local Rule 56.1 to the papers before him and then determined whether summary judgment was warranted on the merits. The court of appeals found no substantive or procedural error and affirmed.

Upon notice, Pet. App. 133-34, the trial judge later did impose a monetary sanction on counsel for Jones and Clark for the oppressive character of the opposition memorandum, Pet. App. 153-60, and granted motions from Local 41 and UPS for recovery of some attorneys' fees under 28 U.S.C. § 1927, Pet. App. 126-132. Those rulings were also affirmed by the court of appeals in a separate decision, Pet. App. 141-51, and are the subject of a second petition for writ of certiorari, *see Buchanan v. United Parcel Service, et al.*, Case No. 06-1113.

Argument

1. This Case Fails to Meet the Criteria for Review.

a. Review on certiorari and the concomitant investment of this Court's time and resources must be reserved for the truly exceptional case presenting an issue of such significance that it transcends the legal relationship of the parties and would, upon resolution here, recast the governing body of law. Generally, that sort of issue derives from a split among the circuit courts on a significant point of law or from a question of such great import that it will affect a broad spectrum of the citizenry. *N.L.R.B. v. Pittsburgh Steamship Co.*, 340 U.S. 498, 502 (1951) ("Certiorari is granted only 'in cases involving principles the settlement of which is of importance to the public as distinguished from that of the parties, and in cases where there is a real and embarrassing conflict of opinion and authority between the

circuit courts of appeal.'") (quoting *Layne & Bowler Corp. v. Western Well Works*, 261 U.S. 387, 393 (1923)). *See, e.g., Hartman v. Moore*, ___ U.S. ___, 126 S.Ct. 1695, 1701 (2006) (certiorari granted to resolve circuit split); *National Cable & Telecommunications Ass'n. v. Brand X Internet Services*, 545 U.S. 967, 980 (2005) (certiorari granted to answer important question of law); *Rumsfeld v. Padilla*, 542 U.S. 426, 434 (2004) (important question of law).

This case presents neither. The first two questions presented attempt to pose "important" due process issues without even defining the contours of the right implicated. The final question depends upon an artificially manufactured division among the circuits. Moreover, as the Plaintiffs' petition amply demonstrates, the questions, even as they are fashioned before this Court, are so wedded to the fact-bound circumstances of this case that the answers would strain to establish any significant principles applicable across any measurable breadth of cases. Essentially, Plaintiffs attempt to use certiorari to garner another level of appellate review to reverse a decision they do not like because it goes against them. This Court declines those invitations to serve as a second-tier court of appeals. Sup. Ct. Rule 10.

To the extent Jones and Clark suggest review in this Court may be warranted to remedy a denial of due process, the petition also should be denied because they never asserted a constitutional claim in the court of appeals. *Bendix Autolite Corp. v. Midwesco Enterprises, Inc.*, 486 U.S. 888, 895 (1988) (Court declines to consider argument party failed to assert below); *Jenkins v. Anderson*, 447 U.S. 231, 233 n.1 (1980) (same). In their brief to the court of appeals, Jones and Clark argued that the district judge imposed summary judgment as a sanction for the defects in their opposition memorandum and did so without notice. They never suggested a constitutional defect, but rather argued that

they should have been afforded an opportunity to correct the offending papers.

b. A fundamental problem with Jones and Clark's argument lies in its incorrect characterization of the trial judge's ruling. He never imposed judgment against Jones and Clark as a sanction. Rather, he simply applied the Local Rules to the memorandum and then ruled on the merits of the summary judgment motions. In that circumstance, Jones and Clark were not entitled to any notice and opportunity to correct or amend their defective papers. The court of appeals so found. Pet. App. 12-13.

Jones and Clark ignore the distinction between a court's discretion in enforcing procedural rules and its more circumscribed authority to impose sanctions as a punishment for chronic bad behavior, *see, e.g., Chrysler Corp. v. Carey*, 186 F.3d 1016, 1019 (8th Cir. 1999) (court strikes defendant's answer and enters default judgment because party repeatedly lied during discovery). The Tenth Circuit recently discussed the distinction between dismissal as a sanction, on the one hand, and disregard of noncompliant facts and entry of summary judgment on the properly presented record, on the other. *Reed v. Bennett*, 312 F.3d 1190, 1196 (10th Cir. 2002). The appellate court held that a trial judge faced with a party's failure to respond to a motion for summary judgment could enter summary judgment if the unopposed motion were otherwise properly supported *or* she could enter judgment as a sanction after expressly determining the behavior warranted punishment. *Id. See also Wienco, Inc. v. Katahn Associates, Inc.*, 965 F.2d 565, 567-68 (7th Cir. 1992). The trial judge here undertook the former option in disregarding Jones and Clark's purported facts and then deciding the dispositive motions on the merits. The Seventh Circuit has also endorsed that course of action in *Hedrich v Board of Regents of University of Wisconsin*, 274 F.3d 1174, 1177-78

(7th Cir. 2001) (The judge properly disregarded plaintiff's entire factual recitation opposing summary judgment because it contained representations that went on for pages, that were not germane to the assertions, or that were cited to other representations rather than record evidence and then properly rendered judgment on the merits on the remaining record). Jones and Clark cite no authority suggesting such an approach to be improper or constitutionally deficient.

Instead, they cite several district court cases in which the judges declined to strike fact statements for noncompliance with local rules. While a ruling to that effect lies within the trial court's discretion, it is not constitutionally mandated. Rather, it is properly characterized as an act of judicial grace. *See, e.g., Little v. Cox's Supermarkets*, 71 F.3d 637, 641 (7th Cir. 1995) (within trial court's discretion to strictly enforce local rules or to forgive violations). Jones and Clark have no right to such dispensation, and the trial judge was not obligated to afford it to them.[6]

6/ Moreover, those cases are factually distinguishable. In *CTC Communications Corp. v. Bell Atlantic Corp.*, 77 F.Supp.2d 124, 128 n.3 (D. Me. 1999), the trial court perused a noncompliant 19-page statement of facts. The burden in doing so would have been minimal compared to searching Jones and Clark's fact statements for properly supported assertions amidst the representations either incorrectly cited or not cited at all and unfounded argument spread over 347 pages – nearly 20 times the length of the statement in *CTC Communications*. In *Helm Financial Corp. v. Iowa Northern Railway Company*, 214 F.Supp.2d 934, 961 (N.D. Iowa 2002), the trial judge declined to strike the nonmovant's summary judgment response for failing to affirmatively state that no additional facts were being offered, although the local rule required such a representation. The trial court correctly characterized that failure as a "technical" noncompliance with the local rule.

The appellate courts universally have entrusted the rejection of insufficiently supported fact allegations to the trial judge's sound discretion. *See, e.g., Hedrich*, 274 F.3d at 1178; *Bordelon v. Chicago School Reform Bd. of Trustees*, 233 F.3d 524, 524 (7th Cir. 2000); *A.M. Capen's Co., Inc. v. American Trading & Production Corp.*, 202 F.3d 469, 472 n.4 (1st Cir. 2000). They do not require that the trial judge find a pattern of contumacious behavior or weigh lesser "sanctions" as an alternative. *Wienco, Inc.*, 965 F.2d at 567-68. Jones and Clark offer no compelling reason to reject that settled approach. To the contrary, local rules themselves provide sufficient notification to the parties and their counsel as to litigation obligations. Failure to follow those rules requires no further notice or allowance for correction. The courts require even parties representing themselves to comply with such procedural rules. *See McNeil v. U.S.*, 508 U.S. 106, 113 (1993) ("[W]e have never suggested that procedural rules in ordinary civil litigation should be interpreted so as to excuse mistakes by those who proceed without counsel.").

Moreover, rules such as Local Rule 56.1 make summary judgment practice manageable for both courts and litigants by isolating the operative facts and the supporting evidence. *Bordelon*, 233 F.3d at 527 (rules aid judges and parties by "imposing some discipline on the pretrial process");*Ruiz Rivera v. Riley*, 209 F.3d 24, 27-28 (1st Cir. 2000). Counsel who would ignore those requirements turn summary judgment practice into a quagmire of legal paper or, as the First Circuit put it, "cat and mouse" games. *Ruiz Rivera*, 209 F.3d at 28. The court of appeals so noted in this case, as well. Pet. App. 9-10.[7]

7/Jones and Clark arguably constructed their 480-page brief to thwart entry of summary judgment not so much on the merits but through sheer oppressiveness. The trial judge saw it that way. Pet. App. 158

To abandon the existing approach would lead to untoward results. In this case, for example, Local 41 and UPS had spent considerable time and money filing reply briefs on summary judgment. Had the trial judge allowed Jones and Clark to submit a "revised" memorandum in opposition, Local 41 and UPS would have incurred even further costs in preparing a second set of replies. Similarly, a party failing to file a timely opposition to a summary judgment motion need not be given notice and the opportunity to submit papers late before the trial court rules on the pending motion. *See Wienco, Inc.*, 965 F.2d at 567. Yet that would be precisely the result of the rule Jones and Clark advocate here.

2. Jones and Clark were Afforded Due Process.

a. Even had Jones and Clark presented a due process argument to the court of appeals (which they did not), they fail to articulate any compelling issue for this Court. In fact, they do not even outline the dimensions of the due process right they contend they have been denied. Instead, they hawk the claim as if it were the legal equivalent of a medicine show elixir – a cure-all for any adverse result in a lower court. And like the barker, they don't mention the ingredients that go into the product.

("It is the opinion of this Court that Document 373 [Plaintiffs' opposition memorandum] represents a form litigation by attrition[.]"). The court of appeals also characterized the opposition memorandum as "unduly burdensome" as a result of its "misstatements and mischaracterizations of the record, failures to provide citations to the record, improper use of cumbersome cross-references, and inappropriate inclusion of legal argument in a purported listing of disputed material facts[.]" Pet. App. 149. And the court of appeals found ample support for the trial judge's conclusion that the opposition was intended to prevent an orderly disposition of the summary judgment motions. Pet. App. 149-50.

Due process, in the constitutional sense, is an extraordinarily malleable concept intended to provide fair notice under the circumstances before a party can be deprived of a protectable interest. *See generally, Quill Corp. v. North Dakota By and Through Heitkamp*, 504 U.S. 298, 312 (1992) ("'notice' or 'fair warning'" often referred to as "the analytical touchstone of due process"); *Mullane v. Central Hanover Bank & Trust*, 339 U.S. 306, 314 (1950) (due process satisfied through notice "reasonably calculated, under all the circumstances to apprise interested parties" of the contemplated action). This Court has described the protection this way: "Procedural due process imposes constraints on government decisions which deprive individuals of 'liberty' or 'property' interests within the meaning of the Due Process Clause of the Fifth or Fourteenth Amendment." *Mathews v. Eldridge*, 424 U.S. 319, 332 (1976).

Jones and Clark do not identify a protectable property interest in their petition. It could be the right to jury trial in civil proceedings protected in the Seventh Amendment or a property interest in their causes of action. In either instance, however, this Court has recognized that summary judgment and its attendant procedural rules afford constitutional due process. *Parklane Hosiery Co., Inc. v. Shore*, 439 U.S. 322, 336 (1979) (summary judgment does not violate Seventh Amendment right to jury trial) (citing *Fidelity & Deposit Co. v. United States*, 187 U.S. 315, 319-20 (1902); *Galloway v. United States*, 319 U.S. 372, 389 (1943) (Notwithstanding the Seventh Amendment, the court has authority to enter judgment against party when evidence is legally insufficient to submit case to jury) (citing Fed.R.Civ.P. 50); *Fidelity & Deposit Co.*, 187 U.S. at 319-20 (precursor to Fed.R.Civ.P. 56 did not deprive litigant of due process or right to jury trial).

Likewise, Jones and Clark do not explain how Local Rule 56.1 or Fed.R.Civ.P. 56 deprived them of due process. As the

court of appeals noted, the rules sufficiently define what is expected of litigants in establishing a factual record supporting or opposing summary judgment and in outlining the consequences of failing to meet those expectations. Pet. App. 12. Thus, counsel for Jones and Clark had adequate notice from the rules themselves that noncompliant factual representations would be discounted. *See Wienco, Inc.*, 965 F.2d at 568 (no due process violation in entering summary judgment against party based on movant's facts when party fails to timely controvert those facts); *Oglesby v. Terminal Transport Co., Inc.*, 543 F.2d 1111, 1112-13 (5th Cir. 1976) (no due process violation when trial judge entered summary judgment against plaintiff because his unsworn statement was inadequate to controvert defendant's factual representations).

In short, Jones and Clark were not deprived of notice as to the potential result when, acting through their counsel, they submitted an opposition to summary judgment that failed to comply with both the letter and spirit of the governing local rule and the Federal Rules of Civil Procedure. Accordingly, they were afforded the process they were constitutionally due.

b. In their second point, Jones and Clark argue a variation of the same theme. They suggest some due process deprivation lurks in the trial judge's decision to strike the whole of their factual representations for nonconformity with Local Rule 56.1. As noted earlier, however, any such consideration would have been an act of judicial indulgence and was neither required under the rule nor by constitutional mandate.

Just as a trial judge need not comb the record to find support for a party's statements of fact on summary judgment, *Ammons v. Aramark Uniform Services, Inc.*, 368 F.3d 809, 818 (7th Cir. 2004); *Ashley Creek Phosphate Co. v.*

Chevron USA, Inc., 315 F.3d 1245, 1257 n.13 (10th Cir. 2003); *Keenan v. Allan*, 91 F.3d 1275, 1279 (9th Cir. 1996), she need not pick and choose among hundreds of representations when a substantial number of them plainly violate the governing procedural or evidentiary rules, *Bordelon*, 233 F.3d at 528-29. The judge has the discretion to find an entire fact statement noncompliant with the rules. *Id.* (The trial court acted within its discretion to strike a party's entire fact statement because it was "so full of argument, evasion, and improper denials that it defeat[ed] the whole point" of the local rules.).

3. There is No Division Among the Circuits.

Finally, Jones and Clark contend there are two circuit splits as a result of the court of appeals decision in this case. But that claim is incorrect. The decision here is not at odds with summary judgment processes employed in other jurisdictions.

First, Jones and Clark assert that the Eighth Circuit's approach in affirming summary judgment in this case based on the movants' papers and supporting record conflicts with what the Second Circuit had done in *Giannullo v. City of New York*, 322 F.3d 139, 143 n. 5 (2d Cir. 2003). In *Giannullo* , the court of appeals held that to the extent a party moving for summary judgment had an obligation to establish facts in support of its position the record evidence must back up the factual statements in the moving papers even if the opposing party failed to contest them. The court, however, also recognized that a party may proceed on summary judgment by asserting that the nonmoving party cannot adduce sufficient evidence to demonstrate a genuine dispute of material fact on an issue on which she bears the ultimate burden of proof. And if the nonmoving party fails to produce such evidence, judgment should be granted. *Id.* at 141 n.2. That essentially is the rule of *Celotex Corp. v.*

Catrett, 477 U.S. 317, 322-23 (1986).

Here, Jones and Clark had the ultimate burden of proof on their § 301/DFR claims to show that Local 41's processing of their grievances was arbitrary, discriminatory, or undertaken in bad faith. Once the trial judge declined to consider their factual assertions, they could not satisfy their obligation on summary judgment to demonstrate a material dispute. The course the trial judge undertook and which the court of appeals affirmed is consistent with *Celotex* and its application as outlined in *Giannullo*.

In addition, the record evidence – particularly the transcripts of the Mo-Kan hearings on Jones and Clark's grievances – establishes that Local 41 satisfied its duty of representation. Thus, even if there were some difference in approach between the Second and Eighth Circuits in handling unopposed factual representations on summary judgment, that difference would neither affect the outcome in this case nor otherwise alter the legal relationship among the parties as it now exits.

Second, Jones and Clark suggest a circuit split between the Seventh and Eighth Circuits insofar as the trial judge here reviewed facts presented in the opposition memorandum without then considering the entire record. They cite *Nabozny v. Podlesny*, 92 F.3d 446, 450-51 (7th Cir. 1996), but fail to accurately present the rule in that case. The court of appeals actually recognized that a trial judge should not go beyond the moving papers to credit legal arguments that had not been presented or to extract uncited evidence from the record *in support of a motion* for summary judgment without then reviewing the complete record.

But the trial judge here did not do so. What he actually did was to consider evidence arguably favorable to Jones and Clark but which neither UPS nor Local 41 had presented in support of the motions for summary judgment. See, e.g.,

Pet. App. 65, 78, 112, 116. The trial judge, however, found that evidence insufficient to avert summary judgment.[8] Thus, the rule in *Nabozny* has no application in this case, since the additional evidence can only be considered favorable to Jones and Clark as the parties opposing summary judgment. The claimed circuit split is wholly artificial.

Conclusion

The petition for writ of certiorari should be denied for want of any substantial issue or an actual division among the circuits on a significant question of federal law.

Respectfully submitted,

G. Gordon Atcheson
The Atcheson Law Office
4800 Rainbow Blvd., Suite 6
Westwood, KS 66205
(913) 362-8650

Counsel for Respondent
International Brotherhood
of Teamsters, Local 41

8/ All of the additional evidence concerns Jones and Clark's claims against UPS and not their claims against Local 41.